

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

RACHEL MILLER, TEXAS DEMOCRATIC PARTY,)	AU:19-CV-01071-LY
DNC SERVICES CORP., DSCC, DCCC,)	
)	
Plaintiffs,)	
)	
V.)	AUSTIN, TEXAS
)	
RUTH HUGHS,)	
)	
Defendant.)	NOVEMBER 22, 2019

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LEE YEAKEL

APPEARANCES:

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produced by computer.

09:30:36 1 (In chambers)

09:30:36 2 MR. SWEETEN: Patrick Sweeten and Todd Disher are
09:30:39 3 here for the Secretary of State. And thank you, Katie, for
09:30:41 4 arranging all of this.

09:30:44 5 MS. FROST: Elisabeth Frost is here for the
09:30:46 6 plaintiffs, and I think a few of my colleagues are also on the
09:30:49 7 line.

09:30:56 8 THE COURT: Okay. Good morning.

09:31:01 9 MR. SWEETEN: Good morning, Judge Yeakel.

09:31:03 10 MS. FROST: Good morning, Your Honor.

09:31:04 11 THE COURT: So this case is already developing way
09:31:07 12 too much weight for what is involved in it, but what I'm
09:31:13 13 concerned about this morning is: Tell me what you have
09:31:18 14 discussed and what you can or cannot agree on regarding
09:31:24 15 scheduling for the response to the application for preliminary
09:31:27 16 injunction and, one, why we actually even need a preliminary
09:31:32 17 injunction since it appears to me that the issue not really
09:31:40 18 going to come up until next November, so I don't see much
09:31:44 19 urgency here.

09:31:48 20 MS. FROST: Your Honor --

09:31:49 21 MR. SWEETEN: Your Honor, Patrick Sweeten on behalf
09:31:52 22 of the State. It's our motion. What we're -- and I agree with
09:31:56 23 the Court, that what they're speaking seeking is -- and they
09:32:04 24 stated the intention of having some sort of relief at the time
09:32:07 25 of the November election. And, Your Honor, they even -- during

09:32:10 1 the course over the discussions in this matter, they even
09:32:13 2 offered to withdraw the preliminary injunction.

09:32:17 3 And so, in light of that, with our Monday deadline
09:32:20 4 for filing a response and given the fact that the injunction
09:32:26 5 itself is laden with expert reports, with legal theories, with
09:32:32 6 affidavits from eight -- I think it's nine total people,
09:32:36 7 including four experts -- and most of this is dumped in from a
09:32:41 8 case that they just tried this summer, Your Honor, we're -- the
09:32:44 9 relief that we came to this Court seeking is a continuance of
09:32:48 10 that response date.

09:32:51 11 And so I agree on the first instance, that I think
09:32:54 12 that we can probably have a status conference, you know,
09:32:58 13 sometime at later time after the parties are at issue and we
09:33:02 14 file our responses by this Court's order, ECF 21, on December
09:33:08 15 12th. The State plans to file a motion to dismiss.

09:33:11 16 And if the only urgency is their claim that, you
09:33:16 17 know, they want to have some sort of ruling by this Court
09:33:21 18 before the November elections, then we could certainly take up
09:33:24 19 these scheduling issues, you know, at a later time other than
09:33:30 20 this singular response date, which is what we're seeking to
09:33:33 21 have continued.

09:33:35 22 And so -- and, Your Honor, I can give you a whole lot
09:33:38 23 more about the background of this case. These lawyers have
09:33:42 24 filed two cases against the State this month. We were served
09:33:46 25 with them two weeks ago. They have already tried this case in

09:33:51 1 Florida, and they just got a decision from their court Friday
09:33:56 2 last week.

09:33:59 3 We are seeing the same experts in this case, and they
09:34:01 4 are attempting to press the State and keep the State from being
09:34:07 5 able to, you know, marshal a defense, from analyzing these
09:34:11 6 opinions, from analyzing this report by what I would call a
09:34:18 7 rope-a-dope with a preliminary injunction, which they basically
09:34:21 8 told us that they'd be willing to take down if we'd agreed to
09:34:23 9 their schedule of a trial in four months -- in four months with
09:34:28 10 an expert disclosure deadline for the State at the end of
09:34:32 11 December.

09:34:32 12 So that would give us, based on their proposal,
09:34:35 13 40 days to meet their expert opinions on a case that we got two
09:34:46 14 weeks ago. So those are the concerns of the State, Your Honor.
09:34:48 15 I can certainly elaborate on any other points that the Court
09:34:50 16 would want to hear from us about this issue.

09:34:54 17 THE COURT: All right. Let me hear from the
09:34:56 18 plaintiff.

09:34:57 19 MS. FROST: Yes, Your Honor. This is
09:35:00 20 Elisabeth Frost.

09:35:00 21 I think the difficulty here in elections cases, it's
09:35:04 22 difficult for plaintiffs to know exactly how far ahead of the
09:35:07 23 election they need to get in order to prevail in order for it
09:35:14 24 to be effective. So, you know, in the past, if the State is
09:35:17 25 willing to say, yes, you know, if we get an order by X date,

09:35:20 1 then I think I agree, Your Honor, that we don't need to do a
09:35:23 2 preliminary injunction application. I think the question is,
09:35:26 3 you know, when is that date and can we work back from that?
09:35:30 4 That's why we suggested two alternatives.

09:35:34 5 One, you know, is the extension of time which is
09:35:38 6 proposed. And, frankly, I think when all is said and done, I
09:35:42 7 expect the opposition and that most of the issues in this case
09:35:45 8 are going to be legal ones, not factual ones, because in this
09:35:49 9 particular area there's just a whole rash of cases that have,
09:35:53 10 you know, been found -- ballot order effect is just not really
09:35:58 11 disputed anymore.

09:35:59 12 But, you know, that being said, we want to do this in
09:36:02 13 a way that, you know, avoids duplication of work, and we don't
09:36:07 14 want to put the State in a position where they don't feel like
09:36:11 15 they have time to respond. So the reason we teed this up for
09:36:15 16 preliminary injunction application, frankly, is usually when we
09:36:19 17 file these things we get the argument: You filed too late;
09:36:22 18 there's not enough time; you know, we plan for our election so
09:36:26 19 far in advance that we can't possibly do that.

09:36:28 20 The Secretary isn't saying that in this case. And if
09:36:32 21 there is, you know, a date by which the Secretary would
09:36:36 22 acknowledge that, you know, if a remedy were entered in our
09:36:42 23 favor it could be addressed in advance of the November
09:36:44 24 election, then we're certainly willing to proceed on that kind
09:36:49 25 of a schedule instead. It would, I think, be an expedited

09:36:53 1 schedule. But, Your Honor, obviously, that's something that we
09:36:57 2 would defer to you and I think would love to hear from the
09:37:01 3 Secretary as to what her position is on that timing issue.

09:37:05 4 MR. SWEETEN: Your Honor --

09:37:06 5 THE COURT: No. Wait just a minute. Let me ask this
09:37:08 6 question: When is the deadline for printing the ballots for
09:37:12 7 November 2020 election?

09:37:15 8 MR. SWEETEN: Your Honor, we've spoken with our
09:37:17 9 client about this, and the Secretary of State's role in this is
09:37:22 10 that what they do is they -- this is my understanding -- is
09:37:25 11 they certify the candidates that will appear on the ballots
09:37:28 12 67 days before the election. They do not prepare the ballots.
09:37:34 13 They do direct the counties on how to prepare -- no. They
09:37:37 14 don't direct the counties on how to prepare the ballots other
09:37:41 15 than by citing the statute in this case. So the counties then
09:37:44 16 take that information and prepare the ballots, and, as I
09:37:47 17 understand it, the counties have to mail the ballots to voters
09:37:51 18 that live abroad 45 days before the election.

09:37:56 19 And, Your Honor, if I can -- if I can respond to --

09:38:00 20 THE COURT: Well, what -- no. No. Not yet.

09:38:03 21 MR. SWEETEN: Yes, sir.

09:38:04 22 THE COURT: Why don't you just guess, then, when the
09:38:06 23 ballots have to be printed, because we have had a lot of
09:38:10 24 elections historically, so there is knowledge out there about
09:38:14 25 how early the counties generally print the ballots. So what do

09:38:20 1 you think is the latest the counties would print the ballots in
09:38:25 2 order to comply with the law that you've just stated?

09:38:32 3 MR. SWEETEN: Well, Judge Yeakel, I think it would be
09:38:35 4 somewhere between the 67 days out from the date of the
09:38:38 5 election.

09:38:38 6 THE COURT: How about giving me a date?

09:38:41 7 MR. SWEETEN: Okay. Let me see if I can -- I can
09:38:43 8 give you that. Yes, sir.

09:39:25 9 Your Honor, I would say late August is probably
09:39:27 10 the -- the best guess that we have right now. And, of course,
09:39:31 11 Your Honor, I mean, we can address and we can get specifics
09:39:35 12 on -- on, you know, some of this information at a later status
09:39:39 13 conference where we -- where we lay these issues out.

09:39:43 14 THE COURT: Well --

09:39:45 15 MR. SWEETEN: But that's our answer, is that we think
09:39:47 16 that late August --

09:39:48 17 THE COURT: All right. That's fine. Let me make
09:39:52 18 some observations. Number one, I applaud the plaintiffs, if
09:39:57 19 they were going to bring this suit, for bringing it early to
09:40:00 20 where we have time to deal with it. I don't often get adequate
09:40:06 21 time in election cases to deal with things. There is adequate
09:40:10 22 time to deal with the case.

09:40:13 23 I do not believe that I need to conduct a hearing on
09:40:16 24 a request for a preliminary injunction. I think we can dispose
09:40:20 25 of this case within six months. I think that gives everybody

09:40:24 1 adequate time to get it briefed and get it prepared.

09:40:28 2 So here is what I'm going to suggest to you-all, and
09:40:33 3 we can either then go ahead and discuss it now or we can get
09:40:36 4 off the line and you-all can discuss it among yourselves: I
09:40:42 5 propose that the plaintiff either withdraw the request for
09:40:46 6 preliminary injunction, or I dismiss it without prejudice, and
09:40:50 7 that you-all agree and prepare a proposed scheduling order that
09:40:57 8 has this case ending no later than June the 30th of 2020.

09:41:02 9 And that gives anybody who wants to go to the Circuit
09:41:07 10 adequate time to get there. It should factor in enough time,
09:41:14 11 if the State's going to file a motion to dismiss, for it to be
09:41:18 12 filed and I look at. And if -- if I were to overrule it, that
09:41:23 13 also gives adequate time for you to agree on a date for a bench
09:41:28 14 trial in this case.

09:41:30 15 I tend to agree there are not going to be many, if
09:41:33 16 any, disputed fact issues, and I think those can be determined
09:41:38 17 by statements, affidavits, and the whole matter can be argued
09:41:48 18 on the law if it survives the motion to dismiss.

09:41:55 19 So, now, let me get your reaction to that.

09:42:01 20 MS. FROST: Your Honor, from the plaintiff's
09:42:02 21 perspective, I think we would be willing -- that sounds like it
09:42:07 22 would work for us and we would withdraw the preliminary
09:42:10 23 injunction, just reserving our right to renew it, obviously, if
09:42:13 24 something happens, you know, in the scheduling or something
09:42:16 25 that's discovered that indicates that, in fact, that's not

09:42:19 1 going to be sufficient time to get relief.

09:42:23 2 MR. SWEETEN: Your Honor, the State's position on
09:42:26 3 that would be that, you know, we certainly can work with
09:42:30 4 counsel towards a trial date of roughly June 30th. We do think
09:42:37 5 there are significant facts that have to be developed with
09:42:40 6 respect to this. We think there are -- you know, we read some
09:42:45 7 of the opinions of these experts, and we definitely think that
09:42:48 8 we are going to have to, you know, put on some factual evidence
09:42:53 9 of those -- of many of the opinions that were offered and
09:42:57 10 they're intending to offer.

09:42:58 11 But, all that said, I think -- I think we can work
09:43:03 12 with a June final trial schedule and work with counsel to see
09:43:08 13 when we can set deadlines and then bring any disputes on those
09:43:12 14 issues to this Court.

09:43:14 15 THE COURT: All right. Well, June is not -- you
09:43:17 16 know, June can slide a little bit into early July. So don't
09:43:22 17 worry about, you know, when I said by June 30th, that doesn't
09:43:26 18 mean you have to schedule a trial date on June the 30th.

09:43:29 19 But what I want you to do is sit down and work out an
09:43:38 20 agreed schedule that gets us to a bench trial sometime in late
09:43:45 21 June, early July. Suggest a date. I don't think it will take
09:43:49 22 more than one day to present everything in this case. If I --
09:43:54 23 if I can't accommodate your date, because we're very busy here,
09:43:58 24 I will move it ever so slightly. But it will be right at the
09:44:03 25 period that you propose and give yourselves time to get this

09:44:08 1 ready to go.

09:44:11 2 I do not worry as much as you-all worry about expert
09:44:15 3 reports. Experts have a way of offsetting one another, and I
09:44:19 4 don't give them a whole lot of weight. What I am primarily
09:44:23 5 interested in this case and want to know -- and you may have
09:44:29 6 already pleaded it -- is the historical background of how long
09:44:34 7 we've been doing it this way and why it has only now become a
09:44:38 8 problem.

09:44:41 9 But what I'm going to do is let you-all go and, by a
09:44:52 10 week from Monday, because we've got the Thanksgiving holiday
09:44:58 11 interfering, I want to see a proposed scheduling order that
09:45:03 12 schedules out everything you want to do, which ends in a bench
09:45:08 13 trial not to exceed one day right around the end of June. And
09:45:14 14 schedule your date for filing a motion to dismiss and a date
09:45:22 15 for responding to it, and make that pretty soon.

09:45:27 16 I want to dispose of the motion to dismiss as early
09:45:31 17 as I can so, if I grant the motion to dismiss, the plaintiffs
09:45:35 18 have plenty of time to get to the Circuit and see what they're
09:45:39 19 going to do and we can still stay on this schedule. If I deny
09:45:43 20 the motion to dismiss, well, then of course we're on this
09:45:47 21 schedule.

09:45:48 22 But I don't want you to push the motion to dismiss
09:45:51 23 date down the line because, if I'm going to overrule it, I want
09:45:56 24 to get it done and I want the State to answer so we can stay on
09:46:00 25 this schedule and finish all of this somewhere around the end

09:46:04 1 of June.

09:46:07 2 So can you get that done by Monday week?

09:46:13 3 MR. SWEETEN: Yes, Your Honor --

09:46:15 4 MS. FROST: Yes, Your Honor.

09:46:15 5 MR. SWEETEN: -- we can.

09:46:16 6 THE COURT: All right. Well, let's do that. And

09:46:18 7 work into that schedule -- or you can just submit me the

09:46:27 8 schedule, and then if the plaintiffs will then file a

09:46:31 9 withdrawal or file a motion to withdraw the request for

09:46:35 10 preliminary injunction and a proposed order with my granting

09:46:40 11 that without prejudice to the plaintiffs refiling, will you do

09:46:45 12 that?

09:46:47 13 MS. FROST: Yes, Your Honor. We'll do that.

09:46:48 14 THE COURT: All right. Well, let's do that. And try

09:46:50 15 to get -- you know, now that we have electronic filing, lawyers

09:46:56 16 believe the day ends at 11:59. Try to get me something by

09:47:00 17 mid-afternoon Monday week so I can get it calendared, because I

09:47:06 18 have a lot of demands on my calendar time and I'm going to have

09:47:11 19 any number of people between now and then that are going to

09:47:14 20 want probably the dates I've been telling you about.

09:47:16 21 So get all of that in. I'm not going to sign an

09:47:19 22 order to this effect, but get me all the documents by

09:47:22 23 mid-afternoon on Monday week.

09:47:25 24 MS. FROST: Yes, Your Honor.

09:47:28 25 THE COURT: All right. Anything else while I have

09:47:29 1 you-all on the phone?

09:47:30 2 MR. SWEETEN: Nothing from the Secretary, Your Honor.

09:47:33 3 MS. FROST: Nothing from the plaintiffs. Thank you,
09:47:35 4 Your Honor.

09:47:35 5 THE COURT: All right. Well, thank you-all, and
09:47:37 6 everybody have a good Thanksgiving break.

09:47:39 7 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
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7 I certify that the transcript fees and format comply with
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10 WITNESS MY OFFICIAL HAND this the 27th day of
11 November 2019.

12

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